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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. .....

EL RANCO, INC., EL RANCO HOTEL OPERATING CO., and BELDON R. KATLEMAN,

Petitioners,

vs.

THE FIRST NATIONAL BANK OF NEVADA, as Administrator of the Estate of RENE BARDY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners El Ranco, Inc., El Ranco Hotel Operating Co., and Beldon R. Katleman respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 1, 1970.

OPINION BELOW

The opinion of the Court of Appeals, unreported, appears in the appendix hereto. The order of the District

Court also appears in the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 1, 1970. A timely petition for rehearing *en banc* was denied on November 5, 1970, and on November 10, 1970, the Court of Appeals issued an Order Staying Issuance Of Mandate pending a petition for certiorari to this Court. This petition was filed within ninety days of the denial of the petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. **Whether the assessment of a penalty for taking a frivolous appeal is, in the circumstances of this case, a denial of due process.**

2. **Whether the appeal in this case was frivolous within the meaning of Rule 38 of the Federal Rules of Appellate Procedure.**

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

Rule 38, Federal Rules of Appellate Procedure:

"If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

Rule 60(b), Federal Rules of Civil Procedure:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Rule 15(a), Rules of Practice, United States District Court for the District of Nevada:

"All proposed findings, conclusions of law, judgments and decrees and all orders affecting title to or creating or affecting a lien upon real or personal property, all appealable orders, and such other orders as the court may direct shall be prepared in writing by the attorney or attorneys for the successful party, unless the judge shall order otherwise; and the same shall embody the court's decision.

"In the case of orders, judgments or decrees,

in the space to the right of the title of the cause and under the number of the cause, counsel shall show the substance of the order, decree or judgment as he desires it entered in the civil docket by the clerk as required by FRCP, Rule 79(a).

"No document governed by this rule shall be signed by the Judge unless opposing counsel shall have endorsed thereon an approval as to form, or shall have failed to file with the judge, within five days from the time of the receipt of a copy thereof, as such time is shown on the original or by affidavit of service, a written detailed statement of the objections thereto and the reasons therefor.

"Counsel, whose duty it is to prepare any such document, shall submit a copy thereof to opposing counsel who shall promptly (1) endorse on the original an approval as to form, or (2) endorse a disapproval as to form, or (3) acknowledge thereon the date and hour of the receipt of the copy thereof. If objections are filed within the time limited herein, the judge may thereafter require the attorneys interested to appear before him or he may sign the document as prepared or as modified by him."

STATEMENT OF THE CASE[1]

On June 24, 1969, after denial by this Court of an

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1 The facts here are based upon Judge Thompson's order of March 6, 1970, attached hereto as an appendix (see appendix page 6).

earlier petition for writ of certiorari (369 U.S. 875), petitioners moved, pursuant to Rule 60(b), Federal Rules of Civil Procedure, for relief from judgment. That motion was denied by the trial court on October 17, 1969, plaintiff (respondent here) to prepare a formal order.

Plaintiff's counsel prepared the formal order, which was filed on October 27, 1969 (see appendix page 8). Copies were mailed to local counsel only, no copy being sent to petitioners' counsel of record, Marks, Sherman and London, which has offices outside of Nevada.

On December 22, 1969, Burton Marks, of Marks, Sherman and London, wrote to the clerk of the Nevada District Court, enclosing an order reflecting the opinion of the court of October 17. He said that "Mr. Galane [respondent's counsel] was supposed to prepare the Order but has probably inadvertently neglected to do so . . . at least we haven't received a copy." This new order was signed by the judge and entered on December 31, 1969.

On March 6, 1970, Judge Thompson declared the December 31 order to be a nullity, stating that "[i]t . . . appears that the duplicate order was requested to reinstate the time to appeal which had expired under the Order entered October 27, 1969, of which adequate due notice had been given" (appendix page 7).

On April 3, 1970, petitioners moved, pursuant to Rule 60(b), Federal Rules of Civil Procedure, for relief from the March 6 order. Judge Thompson, stating that this new motion was nothing more than a request for reconsideration of his March 6 ruling, ordered the second motion stricken on June 1, 1970 (see appendix page 5).

Petitioners subsequently appealed Judge Thompson's

June 1 order. That appeal was dismissed as frivolously taken and damages in the sum of $500 were assessed against petitioners pursuant to Rule 38, Federal Rules of Appellate Procedure. The Court of Appeals for the Ninth Circuit indicated in its opinion that it, too, believed that the December 22nd letter from Burton Marks was intended to mislead the trial court.[2]

REASONS FOR GRANTING THE WRIT

1.a. The Court Of Appeals' Factual Determination Of Bad Faith On The Part Of Petitioners' Counsel, Without A Hearing, Denied Petitioners Due Process Of Law.

It is clear that the penalty meted out here was to punish petitioners and petitioners' counsel for what the District Court and the Ninth Circuit felt was a purposeful misstatement in counsel's letter of December 22, 1969. Petitioners contend that before a penalty for misconduct can be assessed, especially one that affects one's ability to earn a living,[3] *Greene v. McElroy*, 360 U.S. 474, 496 (1959), a hearing, complying with the traditional requirements of due process, is required. *Greene v. McElroy, supra*, 360 U.S. at 507; *Cafeteria & Restaurant Workers v.*

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2 "(We may note that by this order the District Court was led, inadvertently and unintentionally, to extend the time to appeal beyond its power to do so under Rule 6(b), Fed.R.Civ.P.)" (see appendix page 4). Petitioners contend that "inadvertently and unintentionally" modifies the verb "extend" rather than the verb "led," indicating that the District Court's action was inadvertent, not that counsel's was.

3 Counsel for petitioner is an attorney who regularly tries cases before the Ninth Circuit and whose reputation among the justices of that circuit cannot help but be adversely affected by the opinions in this case.

McElroy, 367 U.S. 886 (1961); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 163 (1951); *Endler v. Schutzbank*, 68 Cal.2d 162, 178 (1968); *see, generally*, 1 K. Davis, *Administrative Law Treatise*, § 7.02 at p. 412 (1958); Davis, *The Requirement of a Trial-Type Hearing*, 70 Harv.L.Rev. 193 (1956).

Petitioners further contend that the First Amendment aspects of this case, for the act punished was the filing of a written brief, add weight to the argument that a hearing be required. *Cf.*, Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 Penn.L.Rev. 67, 75 (1960).

b. The Assessment Of A Penalty Under Rule 38 Is Improper In The Circumstances Of This Case And Violates The Due Process Clause Of The Fifth Amendment.

It is clear, both from the text of Rule 38 and from the Advisory Committee Notes, that the rule is meant to apply to appeals that are taken for purposes of delay or are frivolous. 28 U.S.C.A., F.R.A.P. Rule 38 (1969). Here, the focus of the Ninth Circuit was not on the frivolity of the appeal but on the conduct of counsel before the District Court.

The remedy for improper conduct before the District Court is, in the circumstances of this case, a contempt proceeding, a proceeding where a defendant is afforded the notice and hearing required by the Due Process Clause. *See*, 18 U.S.C. § 402; 18 U.S.C., F.R.Crim.P., Rule 42(b).

The action of the Ninth Circuit was thus to deny petitioners and their counsel the hearing required by the

Due Process Clause and 18 U.S.C. § 402 and Rule 42(b) by punishing them pursuant to Rule 38, F.R.A.P. This is not the purpose for which Rule 38 was intended, and it is elemental that such punishment, without forewarning, denies the parties due process.

c. The Due Process Clause Should Be Read to Prohibit Imposing Penalties For Frivolous Appeals Without A Showing That Those Appeals Were Taken Solely For Purposes Of Delay.

Petitioners urge this Court to hold that any penalty for frivolous appeals deprives appellants of due process. This, it is argued, is because the existence of such penalties works a chilling effect upon the likelihood of appeals being taken, *see, Dombrowski v. Pfister,* 380 U.S. 479 (1965), and, where penalties are assessed, punishes both appellants and counsel for attempting to gain redress for error committed by trial courts. This punishment, for acts which are essentially pure speech, *Stromberg v. California,* 283 U.S. 359 (1931), acts to deprive appellants of access to the courts,[4] and of their right to counsel, to deprive them of property without due process of law. *Cf., Douglas v. California,* 372 U.S. 353 (1963); *Griffin v. Illinois,* 351 U.S. 12 (1956).

It is petitioners' position that because of the speech aspects of this case, the Due Process Clause prevents such

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4 The use of such penalties could be a cost to our society as well as to individual parties. Who can say when an issue ceased to be frivolous? *Compare, e.g., Brown v. Board of Education,* 347 U.S. 483 (1954), *with Plessy v. Ferguson,* 163 U.S. 537 (1896).

penalties as were imposed here without a showing of *mens rea. Smith v. California,* 361 U.S. 147 (1959).

2. The Appeal In The Instant Case Was Not Frivolous.

Petitioners' contention on appeal was that the order prepared by respondent's counsel which was filed on October 27, 1969 was not issued in compliance with the Rules of Practice of the United States District Court for the District of Nevada. Rule 15(a) of the Nevada District Court Rules provides that no order shall be signed by the judge unless opposing counsel shall have endorsed thereon an approval as to form or shall have failed to file with the judge, within five days of receipt of a copy thereof, a written statement of objections, and that counsel whose duty it is to prepare an order shall submit a copy thereof to opposing counsel who shall endorse his approval or disapproval or acknowledge receipt thereof.

Rule 15 was not complied with by respondent's counsel or the District Court, and, petitioners contend, the order of October 27, 1969 was therefore invalid. It was this contention, raised before the Ninth Circuit on appeal below, that was termed frivolous and resulted in the penalty assessment.

In view of the increasing importance of Rule 38, *Proceedings of the Judicial Conference of the Sixth Circuit,* 45 F.R.D. 293, 303 (1968), and the reluctance of other circuits to assess penalties, *Carlock v. Nat'l Co-operative Refinery Ass'n,* 424 F.2d 148 (10th Cir. 1970); *Oscar Gross & Son v. Lumbermen's Mutual Casualty Co.,* 422 F.2d 1278 (2d Cir. 1970), even in cases of great importance, *Moses v. Washington Parish School Board,* 421 F.2d 685

(5th Cir. 1970), and high likelihood of dilatory tactics, *Felder v. Harnett County Bd. of Education*, 409 F.2d 1070 (4th Cir. 1969), it is imperative that the limits of the Rule 38 sanction be set forth by this Court. It would appear from the cases that the likelihood of a penalty is greater in the First and Ninth Circuits, *N.L.R.B. v. Smith & Wesson*, 424 F.2d 1072 (1st Cir. 1970); *Local 2, I.B.T.W. v. I.B.T.W.*, 416 F.2d 414 (1st Cir. 1970); a further reason for action by this Court.

The *Felder* case, *supra*, is illustrative. There, the Fourth Circuit, over a vigorous dissent by Justice Sobeloff, refused to assess a penalty in a school desegregation case, holding that there was no "extreme" obstruction nor were moot issues raised (409 F.2d at 1070). Sobeloff said the appeal was frivolous, that the position of appellant "flouts the plain requirements of the law," and cited the thirteen-year history of foot dragging by appellants to avoid *Brown II* (*Brown v. Board of Education*, 349 U.S. 294 (1955)) (409 F.2d at 1076).

It is petitioners' contention that the appellants in *Felder* would have been penalized in the First and Ninth Circuits and that a writ of certiorari should issue to set forth the proper interpretation of Rule 38.

CONCLUSION

For these reasons, the requested writ of certiorari should be granted.

Respectfully submitted,

BURTON MARKS of
MARKS, SHERMAN and
LONDON

Counsel for Petitioners

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ORDER STAYING ISSUANCE OF MANDATE

In the United States Court of Appeals for the Ninth Circuit.

EL RANCO, INC., EL RANCO HOTEL OPERATING CO., and BELDON R. KATLEMAN, Appellants, vs. FIRST NATIONAL BANK OF NEVADA, etc. et al., Appellee.

No. 26,407.

[Filed Nov. 10, 1970]

Upon application of Burton Marks, counsel for the Appellants, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41 (a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellants herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before December 5, 1970.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

Charles M. Merrill
United States Circuit Judge.

Dated: San Francisco, Calif.
November 9, 1970.

We will prepare a certiorari record when directed to do so.

DENIAL OF REHEARING EN BANC

In the United States Court of Appeals for the Ninth Circuit.

EL RANCO, INC., EL RANCO HOTEL OPERATING CO., and BELDON R. KATLEMAN, Appellants, vs. FIRST NATIONAL BANK OF NEVADA, as Administrator of the Estate of RENE BARDY, Appellee.

No. 26,407.

[Filed Nov. 5, 1970]

Before: MERRILL and DUNIWAY, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

ORDER DISMISSING APPEAL

In the United States Court of Appeals for the Ninth Circuit.

EL RANCO, INC., EL RANCO HOTEL OPERATING CO., and BELDON R. KATLEMAN, Appellants, vs. THE FIRST NATIONAL BANK OF NEVADA, as Administrator of the Estate of RENE BARDY, Appellee.

No. 26,407

[Filed Oct. 1, 1970]

Before: MERRILL and DUNIWAY, Circuit Judges.

In 1968, this court decided this case, the opinion appearing at 406 F.2d 1205, *cert. denied* (1969) 369 U.S. 875. On June 24, 1969, appellants filed with the District Court a motion for relief from judgment which was denied by order formally docketed October 27, 1969, with the docket note "Copy to counsel." No notice of appeal was filed within the thirty days prescribed by law. Appellants had been represented by counsel from both Las Vegas, Nevada, and Los Angeles, California. However, the only address of counsel noted on the pleadings was the Las Vegas, Nevada, address and apparently it was to that address that the copy of the order had been sent. On December 22, 1969, Los Angeles counsel wrote to the clerk of court at Reno to the following effect:

> "Enclosed please find an order to be signed by Judge Thompson. Mr. Galane [counsel for appellee] was supposed to prepare the Order but has probably inadvertently neglected to do so . . . at least we haven't received a copy.
>
> "As soon as the Judge has signed the order,

please conform the enclosed copy and return it to us in the envelope provided."

The judge (who was in Reno while the file of the case was in Las Vegas), assuming that in truth no order had been filed, signed and filed a second order December 24, 1969. Notice of appeal from this second order was promptly filed. (We may note that by this order the District Court was led, inadvertently and unintentionally, to extend the time to appeal beyond its power to do so under Rule 6(b) Fed.R. Civ.P.)

When the facts were brought to the attention of the District Court an order was entered March 6, 1970, declaring the second order a nullity.

Appellants then sought relief from the order of March 6, 1970, purporting to proceed under Rule 60(b) Fed.R.Civ. P., and on June 1, 1970, an order was entered denying the motion. It is from that order that this appeal is taken. The matter is before us on appellee's motion to dismiss.

The appeal is dismissed as frivolously taken In lieu of costs, damages in the sum of $500 are assessed pursuant to Rule 30 Fed.R.App.P. [*sic*]

Charles M. Merrill

Ben C. Duniway

Circuit Judges

ORDER

In the United States District Court for the District of Nevada.

THE FIRST NATIONAL BANK OF NEVADA, as Administrator of the Estate of Rene Bardy, Deceased, Plaintiff, vs. EL RANCO, INC., a Nevada corporation, EL RANCO HOTEL OPERATING COMPANY, a Nevada corporation, BELDON R. KATLEMAN, MCA Artists, Ltd., a Delaware corporation, ROY GERBER, and MATT GREGORY, Defendants.

Civil No. LV-370.

[Filed June 1, 1970]

[Entered July 6, 1970]

Defendants El Ranco, Inc., El Ranco Hotel Operating Company, and Beldon R. Katleman on April 3, 1970 filed a paper entitled "Notice of Motion and Motion for Relief from Order Pursuant to Rule 60(b) (4) (5) (6); Affidavit and Points and Authorities in Support Thereof."

The paper is nothing more than a request for reconsideration of the ruling made by the Court on March 6, 1970. The Court has no jurisdiction of it, and if it had jurisdiction of such a repetitive motion, would deny it on the merits.

Accordingly,

IT HEREBY IS ORDERED that the paper filed April 3, 1970, entitled as hereinabove stated, be, and it hereby is, stricken.

Dated: June 1, 1970

Bruce R. Thompson
United States District Judge

ORDER VACATING ORDER ENTERED DECEMBER 31, 1969, DENYING RELIEF FROM JUDGMENT

In the United States District Court for the District of Nevada.

THE FIRST NATIONAL BANK OF NEVADA, as Administrator of the Estate of Rene Bardy, Deceased, Plaintiff, vs. EL RANCO, INC., a Nevada corporation, et al., Defendants.

Civil No. LV-370.

[Filed March 6, 1970]

[Entered March 9, 1970]

Some years ago, there was a rule in effect in the District of Nevada requiring that all transactions with the Court would be through local counsel. The fiasco existing in this case is a demonstration of the virtue of the rule.

On June 24, 1969, defendants El Ranco, Inc., El Ranco Hotel Operating Co. and Beldon R. Katleman filed a motion for relief from judgment. The attorneys for said defendants are named at the top of the pleading on the left side, as required by Local Rule 2(b), as follows: "Samuel Lionel and Leo K. Gold and Marks, Sherman and London, 302 East Carson Street, Las Vegas, Nevada 89101, Tel: (702) 385-2188."

After interim pleadings, an oral hearing on the motion was held before the Court at Reno, Nevada on October 17, 1969, and the decision denying the motion was announced from the bench, plaintiff's attorney being requested to prepare the formal order.

On October 22, 1969, Mr. Morton Galane, attorney

for plaintiff, forwarded his draft of the formal order to the Clerk of the Court. It was presented by the Clerk to the undersigned Judge on October 23, 1969, signed and forwarded to the Clerk at Las Vegas for filing. It was filed by the Clerk on October 27, 1969, and copies were mailed to local counsel, including Samuel Lionel, at the above address.

Under date of December 22, 1969, Mr. Burton Marks wrote the Clerk of this Court at Reno as follows:

> "Enclosed please find an order to be signed by Judge Thompson. Mr. Galane was supposed to prepare the Order but has probably inadvertently neglected to do so . . . . at least we haven't received a copy.
>
> "As soon as the Judge has signed the order, please conform the enclosed copy and return it to us in the envelope provided."

The letter and draft of order were presented to the undersigned Judge in Chambers at Reno, Nevada, on December 24, 1969, the file being in the Clerk's Office at Las Vegas, Nevada. Without observing anything artful about the letter and accepting it at face value, the undersigned Judge retyped the proposed Order and it was signed and filed in Reno on December 24, 1969, and entered on the docket at Las Vegas on December 31, 1969.

It now clearly appears that the duplicate order was requested to reinstate the time to appeal which had expired under the Order entered October 27, 1969, of which adequate due notice had been given. Accordingly,

IT HEREBY IS ORDERED that the "Order Denying Motion for Relief from Judgment" entered December 31, 1969 in the Clerk's Office at Las Vegas, Nevada, is hereby

declared to be a nullity and of no force and effect for any purpose inasmuch as the same order had been duly entered and noticed on October 27, 1969.

Dated: March 6, 1970.

Bruce R. Thompson
United States District Judge

ORDER

In the United States District Court for the District of Nevada.

THE FIRST NATIONAL BANK OF NEVADA, as Administrator of the Estate of RENE BARDY, Plaintiff, vs. EL RANCO, INC., a Nevada corporation, et al., Defendants.

Civil No. LV 370.

[Filed Oct. 23, 1969]

[Entered Oct. 27, 1969]

The defendants, El Ranco, Inc., El Ranco Hotel Operating Co. and Beldon R. Katleman, having filed a Motion for Relief from Judgment on June 24, 1969; a hearing on the motion was held at 1:30 o'clock P.M. on October 17, 1969, and good cause appearing therefor,

IT IS HEREBY ORDERED that the said Motion for Relief from Judgment filed June 24, 1969, is denied.

Dated this 23rd day of October, 1969.

Bruce R. Thompson
United States District Judge

DENIAL OF MOTIONS TO STAY MANDATE

In the United States Court of Appeals for the Ninth Circuit.

EL RANCO, INC., a Nevada corporation, EL RANCO HOTEL OPERATING COMPANY, a Nevada corporation, BELDON R. KATLEMAN, MCA ARTISTS, Ltd., ROY GERBER, and MATT GREGORY, Appellants, vs. THE FIRST NATIONAL BANK OF NEVADA, as Administrator of the Estate of RENE BARDY, deceased, Appellee.

No. 20241.

[Filed April 17, 1969]

The motions of El Ranco, Inc., El Ranco Hotel Operating Co., Beldon R. Katleman, and Roy Gerber, to stay the mandate of this court in the above entitled cause are

DENIED. *Magnum Import Co. v. Coty*, 262 U.S. 159 (1923).

M. Oliver Koelsch
United States Circuit Judge

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 322 Main Street, Huntington Beach, California 92648, that on JANUARY 20, 1971, I served the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, on the following named parties by depositing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

SOLICITOR GENERAL OF THE UNITED STATES
Washington, D. C. 20543

MESSRS. GALANE and WINES
Attorneys at Law
302 East Carson Street
Las Vegas, Nevada 89101

That, in addition to the above, a copy has been forwarded to each of the following:

United States Court of Appeals
For the Ninth Circuit
U. S. Post Office & Courthouse Bldg.
7th & Mission Streets
San Francisco, California 94101

United States District Court
For the District of Nevada
5003 Federal Building
300 Booth Street
Reno, Nevada, 89502

Samuel S. Lionel
Attorney at Law
302 East Carson Street
Las Vegas, Nevada 89101

Leo K. Gold
Attorney at Law
9808 Wilshire Boulevard
Beverly Hills, California 90212

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JANUARY , 1971, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer